

**In the United States District Court  
For the District of Colorado**

**Civil Action No. 1:16-CV-00850**

COCA MINES INC., a Colorado corporation,

Plaintiff,

v.

CONSTITUTION STATE INSURANCE COMPANY, a  
Connecticut corporation,

TRAVELERS CONSTITUTION STATE INSURANCE  
COMPANY, a Connecticut corporation,

THE TRAVELERS INDEMNITY COMPANY OF  
CONNECTICUT, a Connecticut corporation, and

JOHN DOE INSURANCE COMPANY,

Defendants

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**COMPLAINT**

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Plaintiff CoCa Mines Inc. ("CoCa"), by and through its attorneys of record, respectfully submits this complaint against Defendants, Constitution State Insurance Company, Travelers Constitution State Insurance Company, the Travelers Indemnity Company of Connecticut, and John Doe Insurance Company (collectively hereafter referred to "Travelers" unless the reference is to a specific company).

## **NATURE OF CLAIMS**

This is an action for breach of contract, declaratory relief, equitable contribution, common law bad faith, and statutory damages in connection with an insurance policy issued by Constitution State Insurance Company to CoCa. Under this policy of insurance, Constitution State Insurance Company and its successor(s) in interest ("Travelers") are obligated to defend and indemnify CoCa against claims for response costs asserted by the United States and the State of South Dakota associated with the Gilt Edge Superfund site. Although CoCa's other insurance carriers have substantially honored their obligations to defend and to provide coverage and have agreed to participate in a settlement with the United States, Travelers has unreasonably failed and refused to defend and indemnify CoCa, subjecting CoCa to significant risk and ultimately to significant liabilities.

## **PARTIES**

1. CoCa is a corporation organized and existing under the laws of the State of Colorado with its principal place of business in the State of Colorado, when the policy of insurance was issued, and today its principal place of business is in the State of Idaho.
2. Upon information and belief, Defendant Constitution State Insurance Company is or was a Connecticut corporation with its principal place of business in Hartford, Connecticut, occupying the same offices as The Travelers Group of Insurance Companies. Constitution State Insurance Company may no longer have a separate corporate existence. Upon information and belief, The Travelers Insurance Group formed Travelers Constitution State Insurance Company which is or may be a successor by way of name change, to Constitution State Insurance Company, and it is a Connecticut corporation with its principal place of business in Hartford,

Connecticut. Constitution State Insurance Company and Travelers Constitution State Insurance Company are wholly owned subsidiaries of The Travelers Insurance Group of Companies.

3. Travelers Indemnity Company of Connecticut is a Connecticut corporation with its principal place of business in Hartford, Connecticut. An agent of Travelers Indemnity Company of Connecticut has advised CoCa that Travelers Indemnity Company of Connecticut assumed all the assets and liabilities of Constitution State Insurance Company, including the policies issued by Constitution State Insurance Company to CoCa. Upon information and belief, Travelers Indemnity Company of Connecticut is the successor in interest to Constitution State Insurance Company with respect to the policies issued to CoCa.

4. In the event that neither Travelers Constitution State Insurance Company nor Travelers Indemnity Company are successors in interest to Travelers Constitution State, John Doe Insurance Company, another Travelers company, is the successor in interest to Constitution State Insurance Company.

5. The individual Travelers defendants were or are licensed with the Colorado Department of Insurance to sell insurance in the State of Colorado, including property and casualty insurance. The individual Travelers defendants all have done or all now do business in the State of Colorado by selling insurance to citizens of the State of Colorado, and all have intentionally availed themselves of the benefits of doing business in the State of Colorado.

#### **THE INSURANCE POLICY**

6. Constitution State Insurance Company issued an insurance policy numbered CF 257G 347-8 (the "Policy") to CoCa with a policy period of July 30, 1984 to July 30, 1985, and with relevant property damage limits of \$1,000,000 per occurrence and aggregate.

7. Constitution State Insurance Company also issued certain other insurance policies to CoCa, with policy periods covering July 30, 1985 to July 30, 1988 (the “Post-1985 Policies”).

8. The Policy and the Post-1985 Policies were issued to and delivered to CoCa at its principal place of business in Colorado by Constitution State.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this civil action between parties who are citizens of different states because the amount in controversy exceeds \$75,000, pursuant to 42 U.S.C. § 1332.

10. As a civil action against insurance companies that issued policies of insurance in the State of Colorado to CoCa at its principal place of business in Colorado, venue is proper in this Court pursuant to 42 U.S.C § 1391(b).

### **GENERAL ALLEGATIONS**

11. The Policy is a standard form comprehensive general liability policy drafted by Travelers providing coverage for, among other things, property damage, bodily injury, and personal injuries.

12. In or about the year 2000, the United States Environmental Protection Agency (the “EPA”) placed the Gilt Edge Mine Site (the “Site”) in Lawrence County, South Dakota on the National Priorities List as a “Superfund” site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”).

13. On or about December 9, 2009, the EPA sent a “General Notice of Superfund Liability and Request for Information” to CoCa (“Notice of Liability”). In the Notice of Liability, the EPA asserted that CoCa is responsible for release of hazardous substances at the

Site. Among other claims, the EPA asserted it had spent public funds to investigate and control the alleged releases and that CoCa was jointly and severally responsible for cleanup of the Site and for the EPA's response costs, under CERCLA, 42 U.S.C. § 9607(a), as a result of property damage at the Site, which damages the EPA estimated may exceed \$160 million. The EPA alleged that CoCa is liable to the United States as a former owner and operator of the site. The EPA also required CoCa to respond to information requests under CERCLA, 42 U.S.C. § 9604(e).

14. On or about July 9, 2010, the United States Department of Justice wrote to counsel for CoCa informing CoCa that the United States was then preparing to bring a federal court action against CoCa, asserting, among other things, that CoCa was jointly and severally liable for response costs at the Site under CERCLA.

15. On or about July 23, 2010, the United States Department of Justice wrote another letter to counsel for CoCa, explaining the basis for its assertion that CoCa was jointly and severally liable under CERCLA. The United States alleged that CoCa was a successor to Congdon & Carey, Ltd. 5, a company that owned property at the Site and operated at the Site at the time of disposal of hazardous substances. The United States alleged that CoCa was also responsible in its own right both as a former owner and as an operator at the Site. This letter explained the United States' claims that Congdon & Carey, Ltd. 5 was liable for its activities at the site from 1975 to 1982, and that CoCa was liable for its activities at the site from 1982 through 1986.

16. The Notice of Liability and the letters from the Department of Justice identified CoCa as a potential responsible party ("PRP") for response costs at the site. The Notice of

Liability initiated an administrative action under CERCLA against CoCa (“United States’ action”). The coercive nature of CERCLA renders the receipt of the Notice of Liability as a PRP the functional equivalent of a “suit” brought in a court of law as the term “suit” is used in the Policy.

17. On or about January 12, 2011, CoCa tendered the defense of the United States’ action against CoCa to Travelers requesting that, pursuant to the Policy, Travelers defend and indemnify CoCa from and against any and all liabilities alleged by the United States for the Site.

18. CoCa did not tender the defense and indemnity of the United States’ action to Travelers under the Post-1985 Policies.

19. On or about February 8, 2011, CoCa provided Travelers with additional information about the United States’ claims against CoCa at the Site.

20. On or about May 26, 2011, Travelers responded to CoCa’s tender letter, by letter from Travelers’ account executive, Jim C. Ryan, to CoCa. Travelers acknowledged the tender from CoCa, as well as receipt on February 8, 2011, of additional information about the United States’ claims. Travelers stated that Travelers Indemnity Company of Connecticut had assumed all assets and liabilities of Constitution State Insurance Company, including the Policy issued to CoCa. Travelers declined to provide coverage for defense or indemnity under the Post-1985 Policies, even though the Post-1985 Policies were not included in CoCa’s tender. With respect to the Policy itself, Travelers did not deny coverage and, instead stated that Travelers would continue to investigate the United States’ action.

21. CoCa retained counsel to defend the United States' action and advised Travelers that the United States had initiated settlement discussions. CoCa demanded that Travelers participate in the defense through retained defense counsel.

22. Travelers did not file a declaratory judgment action to determine the extent of its duty to defend or indemnify CoCa with respect to the Site or the United States' action.

23. Upon information and belief, Travelers conducted no further investigation of the United States' action against CoCa.

24. Travelers wrote to CoCa by letter of June 26, 2014, from Mr. Ryan, asserting, for the first time, that it would provide no defense or indemnity under any of the policies issued by Constitution State to CoCa, including the Policy. Travelers advised CoCa to take whatever steps CoCa believed were necessary to defend itself. Thereafter, Travelers did nothing to defend or assist CoCa in responding to the United States' action against CoCa. Nevertheless, CoCa continued to provide Travelers information about the United States' action and the status of the settlement negotiations with the United States, including the fact that the amounts sought by the United States from CoCa for response costs far exceeded the policy limits of the Policy.

25. On or about January 8, 2015, CoCa met in Chicago, Illinois with Travelers and representatives of other insurers that provided insurance coverage to CoCa related to the Site during other relevant time periods. This meeting was held to discuss the United States' action, settlement negotiations, and coverage issues. Travelers again declined to defend CoCa or to contribute to the settlement of the United States' action. Travelers merely offered CoCa what it described as a nuisance settlement in exchange for a policy "buy-back."

26. CoCa continued settlement negotiations with the United States that would allow CoCa to resolve the United States' action against CoCa.

27. The other insurers that provided coverage to CoCa related to the Site are hereafter referred to as the "Settling Carriers." Two of these Settling Carriers agreed to defend CoCa from the United States' action. The Settling Carriers also agreed to provide significant funding to CoCa for settlement of the United States' action. In contrast, Travelers refused to participate in the defense or provide any meaningful contribution to settlement even though the relevant language of the Policy was virtually identical to the language of the Settling Carriers' policies.

28. Travelers' refusal to participate in the defense and settlement was based largely on Travelers' assertion that the "joint venture" exclusion in the Policy precluded any potential for coverage. This "joint venture" exclusion has been held to be ambiguous under Colorado law, and that information was conveyed to Travelers. The Settling Carriers' policies all contained the same "joint venture" exclusion, but none of the Settling Carriers refused to participate on that ground.

29. CoCa and the United States have now reached an agreement to resolve the United States' action against CoCa. This Agreement is memorialized in a Consent Decree to be filed in the United States District Court for the District of South Dakota, Western Division.

30. In the Consent Decree, CoCa will be held jointly and severally liable to the United States and the State of South Dakota for response costs arising out of alleged releases of hazardous substances at the Site.

31. The Consent Decree requires CoCa to pay the United States and the State of South Dakota a sum of money to resolve CoCa's liabilities for the Site. Part of that payment is



funded by contributions from CoCa's Settling Carriers. In addition, the Consent Decree requires CoCa to file a lawsuit against Travelers for coverage for the claims asserted by the United States and the State of South Dakota if payment is not forthcoming.

32. The payments that CoCa is required to make under the Consent Decree are to reimburse the United States and the State of South Dakota for response costs incurred under CERCLA at the Site. Response costs incurred under CERCLA are "damages" as that term is used in the Policy, and therefore are covered by the Policy.

33. As a consequence of Travelers' failure and refusal to contribute any reasonable sum to settle the United States' action, CoCa must prosecute this lawsuit. Under the Consent Decree, CoCa must pay the United States a significant portion of the recovery of the indemnity obligations owed by Travelers.

34. By refusing to defend CoCa in the United States' action, Travelers breached its duty to defend CoCa. This failure to defend occurred even though Travelers acknowledged a potential for coverage under the Policy and therefore was also an unreasonable denial of a benefit owed to CoCa under the Policy without a reasonable basis for that delay and denial.

35. Under the law of the State of Colorado, a Notice of Liability as a PRP from the United States directed to a party who may be responsible for damages at a Superfund site is an administrative action that constitutes a "suit" within the meaning of the Policy. Therefore, Travelers is required to defend the United States' action as a "suit" under the terms of the Policy. That duty to defend the United States' action extends through the conclusion of the Consent Decree proceedings filed in federal court against CoCa.

36. Travelers has a duty to defend CoCa whenever the allegations of a “suit” or administrative action raise the potential for liability under the Policy. Travelers admitted that there is a potential that a claim had been asserted against CoCa that would give rise to coverage under the terms of the Policy when it admitted that it could only “partially decline” coverage under the Policy.

37. By failing to provide any defense to CoCa, Travelers has breached its duty to defend CoCa and committed the tort of bad faith, breached its duty of good faith and fair dealing, and unreasonably delayed or denied authorizing payment of a covered benefit under the Policy.

38. By failing to fund any part of the settlement of CoCa’s liability for response costs incurred at the Site as set out in the Consent Decree with the United States, Travelers has breached its duty to indemnify CoCa, committed the tort of bad faith, breached its duty of good faith and fair dealing, and unreasonably delayed or denied authorizing payment of a covered benefit under the Policy.

### **FIRST CLAIM FOR RELIEF**

#### **Breach of Express Contract-Duty to Defend United States’ Action**

39. CoCa repeats and realleges the allegations contained in paragraphs 1 through 38 above.

40. To date, CoCa has paid defense counsel \$151,279.43 in fees that have not been reimbursed by any insurance carrier for CoCa. CoCa is continuing to incur defense costs that should be paid by Travelers.

41. Travelers has breached the terms of the Policy by failing and refusing to defend CoCa against the United States’ action.

42. As a result of Travelers' breach of the terms of the Policy, CoCa has suffered financial damages including without limitation, attorneys' fees and costs incurred in the investigation and defense of the United States' administrative action, the court proceedings for entry of the Consent Decree, and other consequential damages. CoCa will continue to incur these damages while Travelers refuses to defend CoCa until the Consent Decree is finalized and appeals, if any, conclude.

## **SECOND CLAIM FOR RELIEF**

### **Equitable Contribution, Subrogation and Reimbursement Damages**

43. CoCa repeats and realleges the allegations contained in paragraphs 1 through 42 above.

44. Two Settling Carriers provided a partial defense of CoCa, by paying a significant portion of the fees incurred by CoCa defending the United States' action.

45. These two Settling Carriers have entered into a settlement agreement with CoCa, assigning the right to CoCa to recover from Travelers the share of defense costs paid by these Settling Carriers paid and which should have been paid by Travelers.

46. Travelers' willful refusal to defend CoCa left these Settling Carriers to cover that portion of the defense that should, in all equity and conscience, have been borne by Travelers. Based on the assignment from the Settling Carriers to CoCa, CoCa is entitled to recover that portion of the total defense costs attributable to Travelers under the principles of equitable contribution, equitable subrogation, and reimbursement damages.

### **THIRD CLAIM FOR RELIEF**

#### **Breach of Express Contract – Duty to Indemnify for Damages Imposed by the Consent Decree**

47. CoCa repeats and realleges the allegations contained in paragraphs 1 through 46 above.

48. The Consent Decree is a fair and reasonable resolution of the claims asserted against CoCa by the United States.

49. Travelers has breached the terms of the Policy by failing and refusing to indemnify CoCa for the response costs for which CoCa is liable pursuant to the Consent Decree. As a result of Travelers' breach of its obligations under the Policy, CoCa has suffered financial damages specifically including the liabilities imposed on CoCa by the Consent Decree and other consequential damages.

### **FOURTH CLAIM FOR RELIEF**

#### **Common Law Bad Faith, Deceptive Practices, Breach of Duty of Good Faith and Fair Dealing**

50. The allegations of the preceding paragraphs 1 through 49 are incorporated by reference as though set forth in full herein.

51. Travelers owes CoCa a duty of good faith and fair dealing when handling claims under the Policy.

52. Travelers breached its duty of good faith and fair dealing by failing to defend CoCa when there is a potential that the claims against CoCa may be covered by a policy of insurance. There is a heavy burden on an insurance carrier that seeks to avoid its duty to defend

its insured. This breach is particularly egregious because Travelers acknowledged to CoCa that it could not deny coverage under the Policy.

53. Travelers breached its duty of good faith and fair dealing by stating that it would investigate the claims against CoCa, but failed to do so, while at the same time leaving CoCa to defend itself.

54. Travelers breached its duty of good faith and fair dealing by failing to acknowledge and act reasonably and promptly in communications with respect to claims arising under insurance policies.

55. Travelers breached its duty of good faith and fair dealing by failing in good faith to attempt to effectuate a prompt, fair, and equitable settlement of claims.

56. The action of Travelers in admitting that there was a potential for liability under the policy and yet failing to provide CoCa with any defense is unsupported by any reasonable insurance industry standard or practice, and is a deceptive and unfair practice amounting to bad faith by Travelers requiring Travelers to compensate CoCa for all of its damages, settlement costs, and all of the costs and fees incurred in attempting to resolve this matter without regard to the limits of liability under the Policy.

57. The actions set forth herein of Travelers have resulted in CoCa entering into a Consent Decree, which requires CoCa to bring an action against Travelers' to recover the sums Travelers should justly pay. Travelers' actions and omissions are unfair and deceptive practices amounting to bad faith by Travelers requiring Travelers to compensate CoCa for all its settlements costs and all costs and fees incurred in attempting to resolve this matter, without regard to the limits of the Policy, and other consequential damages.

## **FIFTH CLAIM FOR RELIEF**

### **Statutory Damages for Improper Denial of Claims CRS § 10-3-1115 and § 10-3-1116**

58. CoCa repeats and alleges the allegations contained in paragraphs 1 through 57 above.

59. Travelers' refusal to defend CoCa from the United States' action, when Colorado law clearly required a defense of such actions was an improper denial of a claim, and an unreasonable delay or denial of the claim and was carried out in violation of CRS § 10-3-1115, thereby authorizing this action under CRS § 10-3-1116 for attorneys' fees and two times the covered benefit, in addition to the covered benefit.

60. Travelers' refusal to meaningfully participate in settlement of the United States' action, particularly when CoCa and the Settling Carriers had agreed to participate in funding the settlement with the United States, was an improper denial of a claim, and an unreasonable delay or denial of the claim and was carried out in violation of CRS § 10-3-1115, thereby authorizing this action under CRS § 10-3-1116 for attorneys' fees and two times the covered benefit, in addition to the covered benefit.

### **ATTORNEYS' FEES AND COSTS**

61. The allegations of the preceding paragraphs 1 through 60 are incorporated by reference as though set forth herein.

62. CoCa has been required to retain counsel in connection with Travelers' improper denials of its defense and indemnity obligations under the Policy. Accordingly, CoCa is entitled to an award of attorneys' fees and costs in this action as authorized by law.

**NOW, THEREFORE**, CoCa prays for judgment against Constitution State as follows:

1. For the damages imposed on CoCa under the terms of the Consent Decree.
2. For the defense costs incurred by CoCa which were not reimbursed by other insurers in an amount to be proven at trial in excess of \$75,000.
3. For a share of the defense costs incurred by the Settling Carriers, which has been assigned to CoCa, in an amount to be proven at trial in excess of \$75,000..
4. For the policy limits of the Policy in the amount of \$1,000,000.
5. For two times the covered benefit of the unpaid defense costs, in an amount to be proven at trial, in addition to the covered benefit.
6. For two times the covered benefit of the policy limits, for a total of \$2,000,000, in addition to the policy limits.
7. For pre- and post-judgment interest on all sums and any statutory interest or penalties.
8. For attorneys' fees and costs incurred by CoCa in prosecuting this action including pre-filing costs and fees.
9. For other consequential damages.
10. For such other and further relief as the Court deems just.

**A TRIAL BY JURY IS DEMANDED ON ALL ISSUES SO TRIABLE**

Dated: April 14, 2016.

Respectfully submitted,

/s/ Jeffrey S. Pagliuca

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